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Building The Wireless Future™

February 23, 1994

CTIA

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Randall S. Coleman
Vice President for Regulatory Policy and Law

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W. - Room 222
Washington, D.C. 20554

RE: Ex Parte Contact - PR Docket Nos. 94-105, 94-106, 94-108 and 94-110 -- Preemption of State Regulation of CMRS

Dear Mr. Caton:

On Wednesday, February 22, 1994, Mr. Steven W. Hooper, President and CEO, McCaw Cellular Communications Inc.; Mr. Arnold C. Pohs, Chairman, President and CEO, CommNet Cellular Inc.; Mr. Peter P. Basserman, President, SNET Mobility Inc.; Mr. Robert Johnson, Jr., Regional Vice President, Washington-Baltimore Region, Bell Atlantic Mobile; Ms. Eva-Maria Wohn, Director-Regulatory, United States Cellular Corporation; Mr. Phil Forbes, Director of Regulatory/Legislative Affairs, GTE Personal Communications Services; Mr. Thomas E. Wheeler, President and CEO, Cellular Telecommunications Industry Association (CTIA); and Mr. Brian Fontes, Senior Vice President for Policy and Administration, CTIA, met with Chairman Reed E. Hundt and Ms. Ruth Milkman of the Chairman's office; Commissioner James H. Quello and Ms. Lauren J. Belvin and Ms. Maureen O'Connell of Commissioner Quello's office; and Commission Andrew C. Barrett and Ms. Lisa B. Smith, Ms. Virginia Marshall and Ms. Kim Rosenthal of Commissioner Barrett's office. The discussions concerned the proceedings regarding state regulation of CMRS, and expressed positions as previously filed in the above-referenced dockets, and in the attached documents.

Pursuant to Section 1.1206 of the Commission's Rules, an original and one copy of this letter and the attachment are being filed with your office.

If there are any questions in this regard, please contact the undersigned.

Sincerely,

Randall S. Coleman

Attachments

CTIA  *Building The Wireless Future*™

PROMOTING WIRELESS COMPETITION IN ALL 50 STATES

Cellular Telecommunications Industry Association (CTIA)
***Ex Parte* Presentation Concerning**
PR Docket Nos. 94-105, 94-106, 94-108 and 94-110
February 22, 1995

Today's Presentation

- Introduction and Overview — Tom Wheeler (CTIA)
- Specific State Petitions:

California	Steve Hooper (McCaw) Phil Forbes (GTE-PCS) Eva-Maria Wohn (U.S. Cellular)
Connecticut	Peter Basserman (SNET Mobility)
New York	Robert Johnson, Jr. (Bell Atlantic Mobile) Eva-Maria Wohn (U.S. Cellular)
Wyoming	Arnold Pohs (CommNet)

- Conclusion — Tom Wheeler (CTIA)

The Statutory Standard

Congress preempted state regulation of entry and rates for Commercial Mobile Radio Services (CMRS) in order to:

> "[F]oster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[1]

States may regulate rates only if they can demonstrate to the FCC that:

- market conditions fail to protect subscribers adequately from unjust and unreasonable prices or rates that are unjustly or unreasonably discriminatory; or

- that the market conditions, as defined above, exist and CMRS services are a replacement for landline telephone exchange service for a substantial portion of telephone landline exchange service within such state.[2]

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1 H.R. REP. NO. 111, 103d Cong., 1st Sess. 259-61 (1993).

2 See 47 U.S.C. § 332(c)(3)(A)(i) and (ii) (1993).

The Statutory Standard (Continued)

Congress' legislative history provides that:

- The Commission must "be mindful of the desire to give the policies embodied in Section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice."[3]

[3] H.R. REP. NO. 111, 103d Cong., 1st Sess. 261 (1993).

Today We Will Demonstrate:

- The States Have Failed to Meet Statutory Standard to Regulate

and

- State Regulation Thwarts Competition and Harms Consumers

The States Have Failed to Provide the Requisite "Demonstrative" Evidence

California

- Test #1: The CPUC petition does not show market conditions fail to protect subscribers.

  CPUC argues instead that effective substitutes for cellular service do not exist and rate regulation does not appear to have contributed to higher rates and has probably prevented rates from being even higher.

- Test #2: The CPUC petition does not show that commercial mobile radio services are a replacement for landline telephone exchange service for a substantial portion of telephone landline exchange service in California.

- The record evidence refutes the CPUC's claim of little competition, since:

  (1) there are numerous CMRS providers in California including cellular, paging, SMR, ESMR and PCS applicants;
  (2) customer growth is at record levels;
  (3) cellular rates are declining (but $250 million in additional rate decreases delayed or denied in 1993);
  (4) the CPUC has failed to document any discriminatory or anticompetitive actions.

The States Have Failed to Provide the Requisite "Demonstrative" Evidence

Connecticut

- Test #1: The Connecticut DPUC fails to show market conditions fail to protect subscribers.

  The DPUC instead states that a duopoly market is not "truly competitive," despite its 1991 finding that the wholesale cellular market is sufficiently competitive to forbear from further rate regulation.[4]

  Nevertheless, the DPUC concedes that the evidence regarding basic rates is "inconclusive."

- Test #2: The DPUC does not show that commercial mobile radio services are a replacement for landline telephone exchange service for a substantial portion of telephone landline exchange service in Connecticut.

- The DPUC wrongly tries to shift the burden of proof to the carriers.

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[4] Application of Springwich Cellular Ltd. Partnership for a Declaratory Ruling Re: Forbearance From Regulation of Rates of Cellular Telephone Mobile Telephone Service, No. 90-09-03, Slip op. Sept. 25, 1991.

The States Have Failed to Provide the Requisite "Demonstrative" Evidence

New York

- Test #1: The New York PSC petition does not show market conditions fail to protect subscribers.

  Instead, the PSC suggests that cellular rates are higher than local exchange service rates.

- Test #2: The PSC does not show that commercial mobile radio services are a replacement for landline telephone exchange service for a substantial portion of telephone landline exchange service in New York.

  The PSC merely suggests that increased use of cellular indicates that it is becoming an essential service for many segments of society.

- Contrary to New York's assertions:

  (1) Market share is not an indicator of competition in the marketplace; and
  (2) State rate regulation is not necessary because cellular carriers remain subject to the obligations imposed upon all common carriers pursuant to Sections 201 and 202 of the Communications Act.

The States Have Failed to Provide the Requisite "Demonstrative" Evidence

Wyoming

- Test #1: The Wyoming PSC does not show market conditions fail to protect consumers.

- Test #2: The PSC does not show that commercial mobile radio services are a replacement for landline telephone exchange service for a substantial portion of telephone landline exchange service in Wyoming.

- Congress has not empowered the Commission to consider any regulation of market entry by the states, and the authorization sought by the Wyoming PSC to continue regulation of entry is therefore prohibited.

- The PSC does not conclude, nor can it be concluded from the information provided, that state regulation is of any benefit to subscribers.

Conclusion

The FCC does not need to preempt state regulations -- Congress has already preempted state rate regulation. By this action, Congress sought to create a uniform, nationwide and streamlined federal regulatory regime for CMRS.

Congress has provided the FCC with authority to allow states to continue rate regulation only if the states meet the statutory standard.

- No state has met its burden under the proper statutory standard.
- No state has demonstrated a market failure for CMRS or that regulation provides consumers with benefits superior to those of competition
- Allowing states to continue rate regulation which imposes burdensome costs, harms competition, and causes rates to remain higher than competitive levels defeats the national policy of a uniform, ubiquitous, and streamlined federal regulatory structure which Congress envisioned for commercial mobile radio services.

All state petitions should be denied.

San Francisco Chronicle
NORTHERN CALIFORNIA'S LARGEST NEWSPAPER
★★★★ WEDNESDAY, DECEMBER 7, 1994 415-777-1111 50 CENTS

How State Cellular Rule Has Failed

By Peter Sinton
Chronicle Senior Writer

California is the only state where consumers have the option of buying cellular phones separately from cellular service.

In other states, phones and services are typically bundled and in many cases, consumers can get phones for little or nothing if they sign up for a long-term service contract.

In California, consumers may choose to buy hardware and service at the same time, but the equipment vendor is prohibited from discounting the phone more than 10 percent or $20 below the wholesale price, whichever is higher.

The unique California regulation was supposed to spur competition and reduce rates for both phones and phone service. The state wanted to prevent service providers from using their near-monopoly powers and profits to subsidize phones and undercut smaller phone retailers.

But it hasn't worked out that way.

Ben Kahrnoff, general manager in California for GTE Mobilnet, one of the Bay Area's two cellular service providers, estimates that local rates are about 10 percent to 15 percent higher than in most of the 50 other markets served by his company.

"Except for an occasional promotional pricing plan for new customers, since 1984 basic monthly access and usage charges in California remain virtually unchanged and are among the highest in the nation," said Assemblywoman Gwen Moore, D-Los Angeles.

Equipment prices are higher, too. The most popular Motorola flip-phone model that sells for $199 in the Bay Area might cost nothing in Reno or Chicago so long as customers sign a one-year local service contract.

Doug Dade, a supervisor with the California Public Utilities Commission, said the idea behind the state's "anti-bundling" policy was to make cellular service companies compete for customers by offering lower rates, not cheaper phones.

The idea was to make cellular service companies compete for customers by offering lower rates

But the strategy hasn't worked in most markets for two main reasons.

First, cellular service companies pay hefty commissions — $100 or more per customer — to equipment dealers who sign up consumers for their service. The PUC chose not to regulate such commissions.

In addition, the government has done a poor job in policing its regulations, especially in Southern California. Dade said some stores have required consumers to buy service before they buy phones and a few even hand out used phones to those who sign up for new service. Both practices are against the law in California, but regulators have a tough time because their powers extend to service companies, but not retailers.

Some observers including Moore, chair of the Assembly Utilities and Commerce Committee, believe the problem is not state regulation but the fact that the Federal Communications Commission limits service competition by allowing no more than two cellular carriers in each market.

The California PUC is re-examining the way it oversees the multibillion-dollar cellular phone business. Some industry sources expect the PUC will alter its anti-bundling stance in the next few weeks, which could lead to lower equipment prices.

Bill Murphy, owner of the On Line cellular phone store in San Francisco, wouldn't be surprised to see the packaging of equipment and service contracts within a year. "It could make life difficult for any small dealer," he said.

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N E W S R E L E A S E
California Public Utilities Commission
505 Van Ness Avenue, Room 5301 San Francisco, CA 94102
CONTACT: Armando Rendon February 21, 1995 (CPUC-015
415-703-1366 (I88-11-040)

PROPOSAL WOULD PERMIT CELLULAR TIE-IN SALES

A California Public Utilities Commission (CPUC) judge, in what could signal the reversal of a long-standing CPUC ban against tie-in sales in the cellular retail market, has issued for comment a proposed decision that would allow tying a cellular phone discount to a specific cellular service. California is the only state that prohibits tie-in sales of cellular service and equipment.

The proposed decision is not CPUC policy until the Commission votes on it. The proposal is scheduled for vote at the Commission meeting on March 22.

In proposing the policy shift, CPUC Administrative Law Judge Michael Galvin stressed that, by allowing "bundling" or tying-in the sale of equipment to the cellular service, the CPUC's primary goals in regulating the cellular industry would still be maintained, that is, the provision of good service, reasonable rates, and customer convenience while providing for competition that ultimately benefits consumers.

Under the proposed decision, cellular carriers, resellers, and retailers must meet three conditions in order to bundle cellular service with discounted equipment:

---the customer must be offered the option of accepting the bundled equipment voluntarily or of buying only the cellular service;

---the cellular service can be offered only if it is tariffed, that is, sold at rates on file with the CPUC; bundled equipment would have no such restrictions; and,

---retailers must abide by California and federal consumer protection and below-cost pricing statutes.

-more-

At issue in the proposed decision is the interpretation of Public Utilities Code Sections 532 and 702. Section 532 states that no public utility may set a price for any product or any service different from the rates or charges established in its tariff, that is, the statement of rates it must file with the CPUC before it can begin operations. Section 702 requires utilities to do all things necessary to make sure their agents comply with CPUC rules, orders, and tariffs.

Previously, the CPUC did not allow cellular phone stores to discount phones conditioned on the customer subscribing to a particular cellular service company. The cellular phone store was required to sell the discounted cellular phone at the advertised price without requiring service activation.

The Commission concluded in previous cases that a special rate on a product such as a phone, conditioned on the purchase of a tariffed product such as the installation of phone service, adds up to an indirect discount on the tariffed product. According to PU Code Section 532, as presently interpreted, by cutting the price of the phone, the price of the tariffed service is effectively reduced, so the deal is illegal.

The judge's proposal explains that the statute also authorizes the CPUC to allow for exceptions that it considers "just and reasonable." As long as the utility adheres to the tariff rates and charges so that they are not compromised either directly or indirectly, the judge says, bundling cellular service and equipment is legal.

The judge also concludes that PU Code Section 702 does not preclude retailers from bundling as long as they do not directly or indirectly deviate from the prices set by tariff.

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